

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BEE YANG,

Petitioner,

No. CIV S-05-0417 DFL DAD P

vs.

CATHY MENDOZA-POWERS,

Respondent.

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Before the court is respondent's motion to dismiss the petition due to petitioner's alleged failure to exhaust state court remedies.

Petitioner challenges his conviction in the Sacramento County Superior Court for assault with a firearm in violation of California Penal Code § 245(a)(2) with an enhancement for use of a firearm pursuant to California Penal Code § 12022.5(a). (Mot. to Dismiss (MTD) at 1; Petition at 2¹.) In his habeas petition before this court petitioner advances just one claim which he characterizes as follows: "The Trial Court Violated Petitioner's 6th and 14th Amendment

¹ Petitioner's federal habeas petition is docketed as court document number 1 with March 2, 2005, as the filing date. Document 1 also includes other documents filed with the U.S. District Court for the Central District of California before the case was transferred to this court on March 2, 2005.

1 rights to confront his Primary Accuser, and admitted crucial hearsay evidence in violation of
2 CRAWFORD V. WASHINGTON, 2004 U.S. Lexis 1838.” (Petition at 5.)

3 PROCEDURAL HISTORY

4 1. On May 3, 2002, the judgment of conviction was entered in the Superior Court
5 and petitioner was sentenced to serve a 4-year prison term for assault with a firearm with a 4-year
6 enhancement for an aggregate sentence of eight years. (MTD at 1; Resp’t’s Lodged Documents
7 (Lodged Docs.), lodged on June 3, 2005, Doc. No. 1 at 1.)

8 2. Petitioner appealed his conviction to the California Court of Appeal for the
9 Third Appellate District. On April 8, 2003, the judgment of conviction was affirmed. (MTD at
10 2.)

11 3. On May 27, 2003, the California Supreme Court received petitioner’s petition
12 for review. (Pet’r’s Objection and Denial to the Motion to Dismiss (Opp’n), Ex. B at 1.)
13 Petitioner contends that fourteen days earlier, on May 13, 2003, his petition for review was
14 mailed by prison officials to the California Supreme Court. (Id. at 2 and Ex. C at 2.) In a letter
15 dated May 27, 2003, the California Supreme Court notified petitioner that his petition for review
16 was untimely because it was not filed by May 19, 2003. (Id., Ex. B at 1.) Petitioner was advised
17 that he could submit an Application for Relief from Default but that such an application needed
18 to be received by June 6, 2003. (Id.)

19 4. Petitioner contends that on June 3, 2003, he submitted his application for relief
20 from default to prison authorities at Avenal State Prison for mailing to the California Supreme
21 Court. (Id. at 2.) He attaches a mail log of his outgoing mail which reflects that on June 3, 2003,
22 his mail was sent to the California Supreme Court. (Id., Ex. C at 2.)

23 5. In a letter dated June 11, 2003, the California Supreme Court notified
24 petitioner that his petition for review was being returned unfiled because the petition was
25 untimely and no application for relief from default had been submitted to the court by June 6,
26 2003. (Id., Ex. B at 2.)

1 6. On December 1, 2003, petitioner filed a petition for a writ of habeas corpus
2 with the California Supreme Court. (Lodged Docs., Doc. No. 3; Opp'n, Ex. E.) In that petition
3 he argued that his petition for review was timely filed under the mailbox rule set forth in Houston
4 v. Lack, 487 U.S. 266 (1988).

5 7. On September 15, 2004, the California Supreme Court summarily denied the
6 habeas petition. (Lodged Docs., Doc. No. 4.)

7 8. On September 16, 2004, the California Supreme Court received petitioner's
8 document styled, "Addendum to Petition for Review currently before the State Supreme Court."
9 (Id., Doc. No. 3.) In the addendum, petitioner argued that his conviction was improperly
10 obtained through the use of hearsay evidence and in violation of his right to confrontation as set
11 forth in the then-recent Supreme Court decision in the case of Crawford v. Washington, 541 U.S.
12 36 (2004). (Id., Doc. No. 3, "Addendum.")

13 9. On February 10, 2005, petitioner filed his federal habeas petition with the U.S.
14 District Court for the Central District of California.

15 10. On March 2, 2005, the case was transferred to this court.

16 ANALYSIS

17 The issue posed by the pending motion to dismiss is whether petitioner has
18 exhausted state court remedies with respect to his hearsay/confrontation clause claim.

19 I. Parties' Arguments

20 Respondent argues that petitioner has not exhausted his hearsay/confrontation
21 clause claim by presenting it to the California Supreme Court. (MTD at 3.) Respondent
22 concedes that petitioner filed a habeas petition with the California Supreme Court. However,
23 respondent argues that in that state habeas petition petitioner challenged only the timeliness of
24 his petition for review under the mailbox rule and did not raise the substantive
25 hearsay/confrontation clause claim he seeks to pursue in this federal habeas action. (Id.) In this
26 regard, respondent contends that petitioner's addendum in which petitioner addressed the

1 hearsay/confrontation clause issue, was not filed until after the habeas petition filed with the
 2 California Supreme Court had been denied. Thus, respondent contends that the belatedly-filed
 3 addendum did not attach to a petition pending before the court and therefore the substantive issue
 4 raised in the addendum was not properly presented to the California Supreme Court. (Id.)
 5 Finally, respondent argues that petitioner is not entitled to the granting of a stay and abeyance by
 6 this court because the only claim he seeks to present is unexhausted. (Id.) (citing Jiminez v.
 7 Rice, 276 F.3d 478, 481 (9th Cir. 2001).

8 Petitioner responds by arguing that all claims have been exhausted. He contends
 9 that although the California Supreme Court returned his petition for review as unfiled, the Court
 10 stated in its letter, “on June 6, 2003 the court’s jurisdiction expired for the purpose of granting
 11 relief of any nature in this case.” (Opp’n at 4 (emphasis added by petitioner).) Petitioner argues
 12 that this statement by the court is an express waiver of the exhaustion requirement by the state.
 13 (Id. at 6.) Petitioner also argues that his state habeas petition filed with the California Supreme
 14 Court included his hearsay/confrontation clause claim “[n]ot as a ground within the ground
 15 section of the writ application itself, but as an inclusive package to be ruled upon, after having
 16 demonstrated that the original Petition for Review had indeed been filed in a timely manner.”
 17 (Id. at 5.)

18 Based upon the record before this court, it is not entirely clear whether petitioner
 19 attached a copy of his petition for review to his habeas petition when it was submitted to the
 20 California Supreme Court.² Nevertheless, petitioner contends, “Petitioner only knows that he
 21 specifically within the [habeas] writ asked for the relief that, ‘Petitioner should be allowed to
 22 once again file his petition for review with this honorable court.’” (Id.) Petitioner notes that the

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 24 ² There is a discrepancy between the copies of petitioner’s habeas petition filed with the
 25 California Supreme Court which the parties have presented to this court. Respondent’s copy of
 26 the habeas petition (Lodged Docs., Doc. No. 3) does not include the petition for review as an
 attachment. However, to his opposition to the pending motion to dismiss, petitioner has attached
 a copy of his state habeas petition with the petition for review appearing as Exhibit A to that
 habeas petition. (Opp’n, Ex. E.)

1 California Supreme Court did not indicate what issues it was considering. He asserts that since
2 the court issued a “blanket denial,” the denial must be construed as addressing the hearsay claim
3 because that issue was fully briefed in his petition for review and the disposition of the petition
4 for review was placed at issue in his habeas petition. (*Id.* at 5.) If this court were to find that the
5 claim is not exhausted, petitioner argues that he has presented a mixed petition and that this court
6 should elect one of three options: (1) find that the state has expressly waived the exhaustion
7 requirement; (2) find that the improper use of hearsay claim was fairly presented to the California
8 Supreme Court; or (3) grant a stay and hold the pending federal petition in abeyance pending
9 exhaustion. (*Id.* at 7.)

10 II. Analysis

11 The exhaustion of state court remedies is a prerequisite to the granting of a
12 petition for writ of habeas corpus. *See* 28 U.S.C. § 2254(b)(1). A petitioner satisfies the
13 exhaustion requirement by fairly presenting to the highest state court all federal claims before
14 presenting them to the federal court. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per
15 curiam); *Picard v. Connor*, 404 U.S. 270, 276 (1971); *Crotts v. Smith*, 73 F.3d 861, 865 (9th Cir.
16 1996); *Middleton v. Cupp*, 768 F.2d 1083, 1086 (9th Cir. 1986). A federal district court may not
17 entertain a petition for habeas corpus unless the petitioner has exhausted state remedies with
18 respect to each of the claims raised. *See Rose v. Lundy*, 455 U.S. 509, 516 (1982). A federal
19 claim is fairly presented if the petitioner has described the operative facts and legal theory upon
20 which his claim is based. *See Bland v. California Dep’t of Corrections*, 20 F.3d 1469, 1473 (9th
21 Cir. 1994).

22 Under 28 U.S.C. § 2254(b)(3), the exhaustion requirement can be waived, but the
23 waiver must be by the State’s counsel and the waiver must be expressly made. Therefore, the
24 court rejects petitioner’s argument that the exhaustion requirement has been waived in this case
25 by the actions of the California Supreme Court taken in response to his petitions submitted to
26 that court. The California Supreme Court’s letter to petitioner was not an express waiver of the

1 exhaustion requirement. In any event, the California Supreme Court lacks the authority to waive
2 exhaustion.

3 Petitioner's next argument is that his hearsay/confrontation claim has been
4 exhausted because it was fairly presented to the California Supreme Court through his habeas
5 petition. The recent decision by the Ninth Circuit Court of Appeals in the case of Insyxiengmay
6 v. Morgan, 403 F.3d 657 (9th Cir. 2005) is instructive in this regard. The court described the
7 issue presented and its resolution thereof as follows:

8 The State argues that Insyxiengmay did not at any time fairly and
9 fully present the three claims he now appeals to the Washington
10 Supreme Court. . . . It further argues that to the extent that he raised
11 the three claims in his second PRP [personal restraint petition], they
12 were not fairly and fully presented because they were not contained
13 in the body of his brief, but in a separate attachment, the Appendix.
14 The State argues that Washington law prohibits incorporation of
15 issues by reference. Following the denial of his second PRP by the
16 Washington Court of Appeals on the ground that it was not timely
17 filed, Insyxiengmay filed a motion for discretionary review in the
18 Washington Supreme Court. In that motion, he presented the state
supreme court with all three claims in an appendix which consisted
of a full copy of his second PRP. The body of the motion dealt with
the court of appeals' dismissal on the ground of timeliness. The
appendix contained, inter alia, Insyxiengmay's arguments regarding
the three claims that the state contends are not exhausted. All three
arguments contained the requisite references to the pertinent
provisions of the United States Constitution. Thus, Insyxiengmay
clearly presented all three claims as federal issues to the
Washington Supreme Court.

19 403 F.3d at 668. See also Buckner v. Waddington, No. C04-1983-RSL, 2005 WL 1152210 *4
20 (W.D. Wash. May 12, 2005) (finding exhaustion satisfied under the holding in Insyxiengmay
21 where, although difficult to comprehend and not well-organized, petitioner did provide the state
22 supreme court with relevant portions of briefs filed with the lower courts in which his federal
23 constitutional claims were fairly presented).

24 In Insyxiengmay the Ninth Circuit went on to note that exhaustion would have
25 been satisfied even if the petitioner had not filed his appendix discussing the merits of the claims
26 that had been barred as untimely.

1 Indeed, we question whether in order to exhaust the three claims it
2 was even necessary for Insyxiengmay to file an appendix with the
3 Washington Supreme Court discussing their merits. Because in his
4 motion Insyxiengmay asked the Washington Supreme Court to
5 allow the claims to proceed in the court of appeals, and the court
6 declined the request, thus barring him from presenting the claims
7 for review either to the court of appeals or the supreme court, any
8 further duty to exhaust was excused.

9 Id. at 669 n.5.

10 In the present case, just as in Insyxiengmay, petitioner made every effort to provide
11 the California Supreme Court with an opportunity to rule on the claims that he has presented in
12 his federal habeas petition. Before the deadline set by the California Supreme Court had expired,
13 petitioner submitted both his petition for review and his application for relief from default to
14 prison authorities for mailing to the court. After the California Supreme Court rejected his
15 petition for review as untimely, petitioner also filed a habeas petition in which he argued that his
16 petition for review was timely and requested that the California Supreme Court consider his
17 petition which clearly presented his 6th and 14th Amendments hearsay/confrontation clause
18 claim. (Opp'n, Ex. A at 14.) Under the holding of the Ninth Circuit in Insyxiengmay, when the
19 California Supreme Court denied petitioner's habeas petition, his duty to exhaust his claim was
20 satisfied.³

21 Accordingly, IT IS HEREBY RECOMMENDED that:

22 1. Respondent's June 2, 2005 motion to dismiss the petition as unexhausted be
23 denied; and

24 2. Respondent be ordered to file her answer within thirty days from the service of
25 the court's order.

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³ The rationale of the Ninth Circuit in the Insyxiengmay decision compels this conclusion whether or not the petition for review was attached to petitioner's habeas petition filed with the California Supreme Court. See 403 F.3d at 669 n.5.

1 These findings and recommendations are submitted to the United States District
2 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fifteen
3 days after being served with these findings and recommendations, any party may file written
4 objections with the court and serve a copy on all parties. Such a document should be captioned
5 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
6 shall be served and filed within five days after service of the objections. The parties are advised
7 that failure to file objections within the specified time may waive the right to appeal the District
8 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

9 DATED: February 13, 2006.

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13 DALE A. DROZD
14 UNITED STATES MAGISTRATE JUDGE
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